

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2014-009811

11/05/2015

HONORABLE KAREN A. MULLINS

CLERK OF THE COURT  
M. Scott  
Deputy

RACHEL A TURLEY, et al.

SEAN K MCELENNEY

v.

LEO R BEUS, et al.

DAVID B ROSENBAUM

MARTIN A ARONSON  
DANIEL G DOWD  
JAMES E HOLLAND JR.  
MICHAEL C MANNING  
ROBERT J MILLER  
SARA KATHRYN REGAN  
JAY A ZWEIG

MINUTE ENTRY

The Court has considered Plaintiffs' Motion to Dismiss Wil Cardon's Amended Counterclaim, Defendant Wil Cardon's Response thereto, Plaintiffs' Reply, and the oral argument of counsel.

The Court finds that the pending appeal<sup>1</sup> precludes resolution of the foregoing Motion as to Counts 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, thereby leaving only Counts 4 and 5 for resolution.

Motions to dismiss for failure to state a claim are not favored in Arizona. *Acker v. CSO Chevira*, 188 Ariz. 252, 255, 934 P.2d 816, 819 (Ct. App. 1997); *Folk v. City of Phoenix*, 27 Ariz.App. 146, 151, 551 P.2d 595, 600 (1976). A court should not grant such a motion unless it appears certain that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim stated. *Id.* The general rule in deciding a motion to dismiss

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<sup>1</sup> 1 CA-CV 15-0107  
Docket Code 019

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is that all of the material allegations of the pleadings of the nonmoving party are taken as true. *Lakin Cattle Co. v. Engelthaler*, 101 Ariz. 282, 284, 419 P.2d 66, 68 (1966). Moreover, before a Rule 12(b)(6) motion to dismiss is granted, the non-moving party should be given an opportunity to amend the complaint if such an amendment will cure its defects. *Acker v. CSO Chevira*, 188 Ariz. at 255, 934 P.2d at 819; *Sun World Corp. v. Pennysaver, Inc.*, 130 Ariz. 585, 589, 637 P.2d 1088, 1092 (App. 1981).

**Count 4**

In Count 4, Defendants Wil and Nicole Cardon (“Defendant”) allege that Plaintiff Rachel Turley made defamatory statements regarding Defendant, and that Plaintiffs included allegations in the Complaint which in turn were published to Defendant’s investors, the press, and the public at large that had no purpose other than to embarrass Defendant. Plaintiffs allege that these claims fail because (1) no specific defamatory statements are alleged, (2) the claim is barred by the statute of limitations, (3) statements of opinion are not actionable, (4) the statements allegedly made by Plaintiff Rachel Turley did not bring Defendant in disrepute, and/or (5) the statements were made in a privileged setting.

The Court finds the allegations in paragraph 99 regarding statements made by Plaintiff Turley are sufficient to withstand a motion to dismiss. The statement concerning Defendant’s inappropriate behavior and his need to be removed from the Cardon companies immediately and held accountable for his actions is not necessarily opinion, but rather could be construed as grounded on assertions of negative fact. *See Yetman v. English*, 168 Ariz. 71, 76, 811 P.2d 323, 328 (1991).

Next, although the statute of limitation for defamation is one year, A.R.S. §12-541, defamation claims are subject to the discovery rule if the defamation in question is published in a manner in which it is peculiarly likely to be concealed from the person asserting the claim. *Clark v. Airesearch Mfg. Co. of Arizona, Inc.*, 138 Ariz. 240, 673 P.2d 984 (App. 1983). Here, the allegation that the statements by Plaintiff Turley were made to a religious official is sufficient to bring the statement within the discovery rule for purposes of this Motion only. The fact that the same religious official passed them on to a co-Defendant does not defeat this conclusion, nor is it evidence of the truth of the statements, as argued by Plaintiffs. And finally, there is no factual basis in the pleadings to conclude that the statements did not bring Defendant in disrepute. Therefore, the Court declines to dismiss the defamation claim in regard to Plaintiff Turley’s alleged defamatory statements.

The defamation alleged in regard to publishing the Complaint to Defendant’s investors, the press, and the public at large leads to a different result. In Arizona, parties to judicial proceedings are generally granted an absolute privilege to use defamatory language in pleadings

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because of an ‘overriding public interest that persons should speak freely and fearlessly in litigation, uninfluenced by the possibility of being brought to account in an action for defamation. *Sierra Madre Dev., Inc. v. Via Entrada Townhouses Ass'n*, 20 Ariz. App. 550, 552, 514 P.2d 503, 505 (1973). A defamatory statement contained in the pleadings should be absolutely privileged if it is connected with, has any bearing on, or is related to the subject of inquiry and is not completely frivolous. *Id.*, 20 Ariz. App. At 553-54, 514 P.2d at 506-07. The Court has not found anything within the Complaint that appears to be unconnected to or having no bearing on the subject therein. Because the Complaint is static, these allegations cannot be cured through amendment. Thus, paragraphs 194-199 are dismissed.

**Count 5**

In Count 5, Defendant alleges intentional infliction of emotional distress by accusing him of stealing, badmouthed him, excluded him from family functions, while knowing he suffered from depression and had other mental health challenges. Plaintiffs generally accurately state the law applicable to claims of intentional infliction of emotional distress, and thus it is not repeated here. However the Court disagrees with their conclusion that the claim fails on its merits under that case law.

As pled, Defendant alleges that he suffered from depression and other mental-health challenges, and Plaintiffs deliberately capitalized on his emotional vulnerability, even ensuring he was aware he was being excluded from family Christmas and Thanksgiving celebrations. Taking these facts as true, they clearly meet the requirement that the conduct be intentional. Moreover, these actions are not, as a matter of law, outside the realm of extreme or outrageous conduct given Plaintiffs’ alleged knowledge of Defendant’s mental health issues. Therefore, the Court declines to dismiss the defamation claim in regard to Plaintiffs alleged intentional infliction of emotional distress.

**IT IS ORDERED** staying Plaintiffs’ Motion to Dismiss Wil Cardon’s Amended Counterclaim in regard to Counts 1-3 and 6-16.

**IT IS FURTHER ORDERED** dismissing with prejudice those allegations in Defendants Wil and Nicole Cardon’s Counterclaim appearing in Count 4, at paragraphs 194-199 only. The Motion is denied in all other respects as to Counts 4 and 5.